

**ARA Services, Inc. and Local 259, United Automobile Workers, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO. Case 2-CA-18520**

August 3, 1982

### DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

Upon a charge filed on January 13, 1982, by Local 259, United Automobile Workers, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, herein called the Union, and duly served on ARA Services, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint on February 8, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 16, 1981, following a Board election in Case 2-RC-18943,<sup>1</sup> the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about October 15, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 15, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 4, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 10, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause, and a motion to amend its response and to request the Board to intervene in the Immigration and Naturalization Service proceeding. It later filed an addendum to the motion to amend.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

In its answer to the complaint, and response to the Notice To Show Cause, Respondent contends that the certification of the Union in the underlying representation case is invalid on the basis of its objection therein and that due process of law requires that a hearing be conducted in this proceeding.

Our review of the record herein, including the record in Case 2-RC-18943, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on March 13, 1981, and resulted in a vote of 11-to-9 in favor of the Union. Respondent filed timely objections to the conduct affecting the results of the election. The objections allege in substance that during the critical period the Union threatened certain eligible voters with deportation if they did not vote for the Union. On May 27, 1981, the Acting Regional Director issued his Report on Objections in which he stated that investigation revealed that employee Antones allegedly told two employees, Mascoso and Campoverde, they had better vote for the Union, or he would report their possible illegal alien status to the United States Immigration and Naturalization Service. Antones denied making such a statement. The Acting Regional Director also reported that no evidence was submitted and none was adduced to show that Antones was an official of the Union or that the Union authorized Antones to act as its agent, that it condoned or ratified the alleged statements, or that it was even aware that the statements were made. Relying on longstanding Board policy<sup>2</sup> regarding third-party campaign statements, the Acting Regional Director found that, even if Antones made the statements attributed to him, they would not have caused widespread fear and confusion, rendering freedom of choice impossible. Accordingly, he recommended that the objections be overruled and a certification of representative be issued to the Union.

Respondent filed timely exceptions to the Acting Regional Director's Report on Objections reiterat-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 2-RC-18943, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> See *Price Brothers Company*, 211 NLRB 822 (1974).

ing its objections, arguing that the alleged threats gained significance because some voters were possibly illegal aliens and because the tally of ballots was close, and requesting that the election be set aside or an evidentiary hearing be conducted. The Board on September 16, 1981, issued its Decision and Certification of Representative,<sup>3</sup> adopting the Acting Regional Director's findings and recommendations.

On February 10, 1982, Respondent filed with the Board in Case 2-RC-18943 a "Motion to Revoke Certification; to Reopen Record; for Hearing on the Objections; and a Motion for Reconsideration by Board *en banc*," on the grounds that a hearing would provide a full record regarding Antones' status with the Union, based on newly acquired unsigned statements by Mascoso and Campoverde, the voters allegedly threatened by Antones,<sup>4</sup> that: Carmindo [Antones] had been a very active union supporter. We felt that the Union, which was a big organization, would be able to get us deported . . . .

. . . No one from the Union has ever told us not to worry, or that immigration would not be a problem for us.

By letter from the Board's Executive Secretary dated February 26, 1982, these motions were rejected on the basis of Section 102.64(e) of the Board's Rules and Regulations, Series 8, as amended. On March 3, 1982, Respondent requested the motions be submitted to the Board for a ruling, and on March 15, 1982, the Board issued a ruling denying the motions. On April 27, 1982, the Board denied Respondent's further request for reconsideration.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>5</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein

<sup>3</sup> Not reported in volumes of Board Decisions.

<sup>4</sup> Respondent stated it had been unable to obtain interviews with these individuals during the investigation of objections because of their fears, and though they had subsequently agreed to talk they were afraid to execute statements. In its addendum to the motion to amend the response to the Board's Notice To Show Cause, Respondent submitted copies of the statements that had been signed by Mascoso and Campoverde on June 15, 1982.

<sup>5</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

which would require the Board to reexamine the decision made in the representation proceeding. Noting that the statements by Mascoso and Campoverde do not provide new evidence regarding Antones' agency status, we therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.<sup>6</sup> Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, with a place of business located in Tarrytown, New York, is engaged in food service. During the calendar year 1981 Respondent derived gross revenues in excess of \$500,000. During the same period Respondent purchased goods or services in excess of \$50,000 directly from outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time kitchen and cafeteria employees employed by ARA Services, Inc. located in the Union Carbide Building, Old Sawmill River Road, Tarrytown, New York; and excluding all office clerical

<sup>6</sup> Consequently, we deny Respondent's request for a hearing and its motion requesting the Board to intervene with the United States Immigration and Naturalization Service in order to preserve testimony from S. Mascoso, who, according to the Respondent, is scheduled for deportation on August 5, 1982.

employees, guards and supervisors as defined in the Act.

## 2. The certification

On March 13, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 16, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 13, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 15, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 15, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in

the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. ARA Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 259, United Automobile Workers, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time kitchen and cafeteria employees employed by ARA Services, Inc. located in the Union Carbide Building, Old Sawmill River Road, Tarrytown, New York; and excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 16, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 15, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has en-

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, ARA Services, Inc., Tarrytown, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 259, United Automobile Workers, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time kitchen and cafeteria employees employed by ARA Services, Inc. located in the Union Carbide Building, Old Sawmill River Road, Tarrytown, New York; and excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant located at Tarrytown, New York, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms provided

by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 259, United Automobile Workers, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time kitchen and cafeteria employees employed by ARA Services, Inc. located in the Union Carbide Building, Old Sawmill River Road, Tarrytown, New York; and excluding all office clerical employees, guards and supervisors as defined in the Act.

ARA SERVICES, INC.

<sup>7</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."